Supreme Court, U.S.
FILED
APR 24 1997
CLERK

No. 96-1482

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEXECON INC., *et al.*,
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

MICHAEL W. MCCONNELL
STEPHEN M. SHAPIRO
MICHELE L. ODORIZZI
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, IL 60603
(312) 701-7201

KENNETH S. GELLER
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK
SEAN A. LEV
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 pp

TABLE OF AUTHORITIES

Cases	Page
Caterpillar, Inc. v. Lewis, 117 S. Ct. 467 (1996)	6-7
Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291 (3d Cir. 1994)	6
Friedman v. United States, 927 F.2d 259 (6th Cir. 1991)	9
Gogolin & Stelter v. Karn's Automobile Imports, Inc., 886 F.2d 100 (5th Cir. 1989), *cert. denied*, 494 U.S. 1031 (1990)	6
Leroy v. Great Western United Corp., 443 U.S. 173 (1979)	6
Lovelace v. Software Spectrum Inc., 78 F.3d 1015 (5th Cir. 1996)	9
Olberding v. Illinois Century R.R., 346 U.S. 338 (1953)	5
Papasan v. Allain, 478 U.S. 265 (1986)	9
Schnell v. Peter Eckrich & Sons, Inc., 365 U.S. 260 (1961)	6
St. Louis v. Praprotnik, 485 U.S. 112 (1988)	8
Stevens v. Department of Treasury, 500 U.S. 1 (1991)	8
United States v. Maryland Casualty Co., 573 F.2d 245 (5th Cir. 1978)	6
Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991)	8
Winchester Homes, Inc. v. Osmose Wood Preserving, Inc., 37 F.3d 1053 (4th Cir. 1994)	9
Statutes and Rules	
28 U.S.C. § 1404(a)	*passim*
28 U.S.C. § 1407(a)	2, 3
Fed. R. Civ. P. 54(b)	10
JPML Rule 14(b)	8
JPML Rule 14(d)	8
Other Materials	
H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1482

LEXECON INC., *et al.*,
Petitioners,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONERS' REPLY BRIEF

Respondent Milberg Weiss does not dispute that the Ninth Circuit decision at issue here raises a significant, recurring legal issue. It does not deny that "self-transfer" has become a commonplace aspect of multidistrict litigation, or that this "remarkable power grab" by the federal courts (Pet. App. 30a (Kozinski, J., dissenting)) has forced an enormous number of plaintiffs to go to trial in forums they would never have chosen. On the contrary, Milberg itself emphasizes the multitude of cases involving the same, purely legal question presented here. Milberg Opp. at 12-13 & n.6.

Milberg nevertheless contends that, because the lower courts are in agreement, this widespread practice does not merit the Court's attention. But, as Professor Wright explains, the federal courts obtain their authority by Act of Congress, not by "adverse possession." *Amicus* Br. of Charles Alan Wright at 8.

Unless, therefore, Milberg can demonstrate that self-transfer actually accords with the language of the relevant statutes, the very fact that the practice is so deeply entrenched provides an extraordinarily compelling basis for this Court's review. The Court has few duties more important than ensuring that the federal courts do not systematically ignore the limits that Congress has placed on their authority.

Although Milberg acknowledges that this case raises an abstract legal issue that turns on the "plain terms" of the relevant statutes (Milberg Opp. 15), it has failed utterly to come to grips with those plain terms or to raise any other concerns that would counsel against a grant of certiorari.[1]

1. As Judge Kozinski has remarked, "[i]t's hard to imagine a clearer statutory command" than the one contained in section 1407(a). Pet. App. 59a (Kozinski, J., dissenting). Section 1407(a) states that the Joint Panel on Multidistrict Litigation ("JPML") is empowered to transfer cases only for "coordinated or consolidated *pretrial* proceedings" and that such cases "*shall* be remanded" at the conclusion of such proceedings (emphasis added). The statute provides only one exception to this mandatory remand rule: cases need not be remanded where they "have been previously terminated." 28 U.S.C. § 1407(a).

Milberg seeks to create a second exception that appears nowhere in the statute—and that would swallow the rule. It argues that motions to change venue fall under the rubric of "consolidated or coordinated pretrial proceedings" and thus that section 1407 empowers transferee courts to "transfer" cases to themselves for all purposes, including trial. Milberg Opp. 15-16. But, as our petition made

[1] Respondents Joseph W. Cotchett, Susan Illston, and Cotchett Illston & Pitre have filed a separate opposition that, they admit, does not even address the primary question posed by the petition. *See* Cotchett Opp. 13 n.4. Instead, their opposition attempts to raise certain peripheral procedural issues that are irrelevant to the central legal question presented here. *See infra* p. 10 n.8.

clear (at 17-18)—in arguments to which Milberg hazards no response—such an understanding of the scope of the transferee court's authority would distort section 1407 beyond all recognition. It would turn Congress's unequivocal command that a case "shall be remanded" into a meaningless suggestion that the case "shall be remanded unless the transferee court decides it should not be." And it would allow transferee courts to bootstrap their carefully limited authority to conduct only "coordinated or consolidated pretrial proceedings" into a boundless license to hold onto a case for all purposes. Nothing in section 1407's plain language suggests that Congress understood that its clear directives could be so easily circumvented.[2]

Furthermore, the only statute that Milberg has cited as a source of authority for "self-transfer," 28 U.S.C. § 1404(a), plainly does not authorize that practice. Milberg contends that section 1404(a)'s reference to transfers to "any other district" means that a court may send the case to any court other than where the suit was brought. Milberg Opp. 17. But, other than labeling this reading as "natural," "straightforward," and "common-sens[ical]" (*id.*), Milberg provides no support for it at all.

And, in fact, this reading is untenable when section 1404(a) is read in full. That provision states: "For the convenience of parties and witnesses, in the interest of justice, *a district court* may transfer any civil action *to any other district or division* where it might have been brought" (emphasis added). The only interpretation of that language that makes any linguistic sense is that the

[2] Respondents persist in contending that only the JPML has a duty to remand, and that a transferee court is free to ignore this plain statutory directive. But, as our petition explains (at 17-18), the delegated authority of transferee courts cannot be broader than what section 1407(a) provides. Nor can the JPML broaden its powers (or avoid a clear statutory obligation) by delegating to transferee courts the authority to rule on remand motions in the first instance. Indeed, such a transparent dodge would eviscerate the mandatory remand requirement. Significantly, Milberg does not even attempt to counter these arguments.

"other district court" that may receive the case stands in contrast to the "district court" that "may transfer" it. Put differently, section 1404 contemplates that cases may be sent to any district in which venue would be proper "other" than the one where the case is currently pending. *See* Pet. App. 42a & n.9 (Kozinski, J., dissenting).

Moreover, Milberg never explains why section 1404, which was enacted decades before section 1407's passage even raised the possibility that a court would be in a position to "transfer" a case to itself, should be understood to authorize such a practice. *See* Pet. App. 42a (Kozinski, J., dissenting). As Professor Wright explains, "[a] 1948 statute cannot be given a meaning it could not have had when it was adopted in order to provide a result under a 1968 statute that Congress specifically considered and expressly rejected." *Amicus* Br. of Charles Alan Wright at 6.[3]

2. When Lexecon sought mandamus relief on the self-transfer issue from the Ninth Circuit, Milberg claimed that such relief should be denied because Lexecon could seek review of that issue after final judgment. Milberg was unequivocal on this point: "[*T*]*here is no question*

[3] Unable to ground any serious arguments in the statutory language, Milberg relies on the same statements from the legislative history torn from context and quoted by the Ninth Circuit. We have already shown (Pet. at 12-13 & n.2) that, in fact, Congress made abundantly clear that transferee courts would have *no* authority to oversee "trial proceedings" unless and until "amendments to the present language" were made. H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902. Milberg never grapples with that directly relevant statement or, for that matter, with the other, similarly clear evidence of Congress's understanding on this point. *See id.* at 1900, 1901 (proposed statute "does not . . . include the trial of cases in the consolidated proceedings" and would "not affect the place of trial in any case"). *See also Amicus* Br. of Charles Alan Wright at 4 ("The legislative history is unambiguous. Congress knew that it was authorizing transfer for pretrial proceedings only and that when those proceedings were ended, the case was to be remanded to the transferor court.").

that Lexecon can seek review of the order changing venue following final judgment."[4]

Milberg has now done an abrupt about-face. It now claims that the self-transfer decision is completely unreviewable after final judgment, and thus that this Court is powerless to stop the federal judiciary's concerted disregard of the plain language of a federal statute. That new-found position is as wrong as it is opportunistic.

Milberg rests its argument on two premises: (1) that trial occurred in a forum where the case could have been brought and (2) that no showing of prejudice has been made. Milberg Opp. 22. Neither assumption has any relevance to this case.

First, although this case *could* have been brought in Arizona, the crucial point is that Lexecon, exercising its deeply-rooted right to select the forum, chose not to do so. It brought suit instead in its home district. And, when the case was sent to Arizona under section 1407, that court had authority only to conduct *pretrial* proceedings. The Arizona court had no legal authority at all to conduct a trial. Put differently, venue for the trial in Arizona was unlawful and in derogation of the express rights that Congress has granted to multidistrict plaintiffs like Lexecon.

In such a circumstance—where a party had been forced to have its case resolved in an improper venue—this Court has not hesitated to conclude that reversal is required, whether or not "prejudice" has been shown. *Olberding v. Illinois Century R.R.*, 346 U.S. 338, 340 (1953) ("[U]nless the defendant has also consented to be sued in that district, he has a right to invoke the protection

[4] Milberg Defendants' Response in Opposition to Petitioners' Motion for a Stay of District Court Proceedings Pending a Decision on their Petition for Writ of Mandamus at 8 (emphasis added). The Ninth Circuit relied on this same argument in denying mandamus. Pet. App. 56a ("[W]e are not satisfied that petitioners cannot attain the relief they request on direct appeal.").

which Congress has afforded him. The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."). *See also Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961) (rejecting argument that application of venue statute "exalts form over substance"); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 184-85 & n.18 (1979).[5] Thus, as Milberg previously emphasized (when it was to its benefit), there is nothing at all unusual about seeking—and obtaining—reversal after trial where Congress has not authorized venue in the court below.

In any event, Milberg's claim that Lexecon has suffered no prejudice here blinks reality. Lexecon was dragged thousands of miles from home and forced to trial in a forum where "there was much popular feeling against Lincoln Savings, Charles Keating, and those (like [Lexecon]) who were associated with them." Pet. App. 47a (Kozinski, J., dissenting). Milberg exploited this unlawfully obtained advantage to the hilt. Its trial presentation repeatedly highlighted Lexecon's alleged relationship with Charles Keating. *See* Pet. App. 47a n.15 (Kozinski, J., dissenting) (describing how Milberg's counsel "peppered his arguments with references to Charles Keating's misdeeds and [respondents'] attempts to recover money for the victims"). Milberg's claim that the Court should deny review because there was no harm thus rings hollow.

Nor does the Court's recent ruling in *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), counsel against granting review in this case. *Caterpillar* had nothing at all to do with venue, and it did not discuss, much less limit, *Olberding*'s unequivocal holding that reversal is proper when statutory venue requirements are violated. It thus has no relevance here.

---

[5] *Accord Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 297 (3d Cir. 1994); *Gogolin & Stelter v. Karn's Auto Imports, Inc.*, 886 F.2d 100, 104 (5th Cir. 1989), *cert. denied*, 494 U.S. 1031 (1990); *United States v. Maryland Casualty Co.*, 573 F.2d 245, 248-49 (5th Cir. 1978).

In any event, the *Caterpillar* Court decided that a new trial was not warranted because (1) the jurisdictional flaw that existed at the time of a removal from state court had been "cured" by the time of final judgment and (2) the end result in the case was consonant with the relevant Congressional policy in favor of efficiency and economy. *See id.* at 476-77. Neither point holds true here.

Unlike the removal statutes at issue in *Caterpillar*, section 1407 is all about authorizing *limited* transfers and ensuring plaintiffs of their right to trial in their chosen forum. When a trial is held in an improper district, that clear statutory rule is violated and nothing that occurs afterwards can "cure" that breach. Moreover, under no theory is the result in this case "in harmony" with the relevant Congressional policy. *Id.* Congress chose to preserve plaintiff's forum rights even at the expense of some inefficiency. If this Court were to allow this judgment to stand in the name of "finality, efficiency, and economy," as Milberg suggests (Opp. 23), it would be subverting the very policy choices that are at the heart of section 1407. Nothing in *Caterpillar* provides any support for such an improper outcome.

Indeed, *Caterpillar* demonstrates why the Court should grant review here. In *Caterpillar*, the Court stressed that its result was grounded in the assurance that there was no danger that the lower courts "generally will not comprehend, or will balk at applying, the rules on removal." *Caterpillar*, 117 S. Ct. at 477. This case, by contrast, involves decades of *demonstrated* disregard for a clear statutory mandate. That systemic violation of Congressional will demands correction by this Court.

3. Milberg makes one other attempt to deflect the Court's attention from the significant legal issue squarely presented here. It alleges that Lexecon has somehow waived its objections to the Arizona court's self-transfer action. That argument is meritless.

As the petition explains (at 18 n.4), Lexecon followed proper procedure to the letter in seeking relief on this

issue. The JPML's own rules instruct litigants to seek a remand, in the first instance, from the transferee court. JPML Rule 14(d). Lexecon accordingly moved the Arizona court to remand the case to Illinois. That court initially held the matter in abeyance, so Lexecon renewed its request. The Arizona court then denied Lexecon's motion and simultaneously transferred the case to itself, which, under the JPML's rules, *deprived* that body of all jurisdiction over the remand issue. *See* JPML Rule 14(b). *Contrast* Milberg Opp. 25 (suggesting, without support, that Lexecon could have sought a remand from the JPML after the self-transfer decision).

Accordingly, Lexecon challenged the separate self-transfer decision through all available means—first on mandamus and then on direct review of the final judgment. As Judge Kozinski explained, any attempt to "fault[]" Lexecon for "following the JPML rules" in its extensive attempts to obtain relief on these questions is a "sucker-punch" (Pet. App. 32a n.1)—especially in light of Milberg's prior acknowledgment that there was "no question" that this issue could be addressed after final judgment.

In any event, there is no dispute that the Ninth Circuit reached the merits of the issue Lexecon presents here. In such a circumstance, this Court has not hesitated to grant review of significant federal questions presented by a case, regardless of any claim of prior procedural error by the petitioner. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *St. Louis v. Praprotnik*, 485 U.S. 112, 120-121 (1988).

4. Finally, Milberg dismisses Lexecon's second question as not certworthy. But it is evident that the complaint in this case, if taken as true, presented issues of considerable importance involving the very kinds of abuse of the judicial system by prominent class action securities

lawyers that Congress has condemned.[6] Those issues have never been decided because the Ninth Circuit, rejecting established practice as mere "formalism," looked to dubious "public record" materials to resolve *disputed fact* issues at the motion to dismiss stage. That result directly conflicts with the decisions of other courts of appeals, which have carefully limited the use of public records to instances where the issue is so clear it would be subject to judicial notice. *See, e.g., Friedman v. United States*, 927 F.2d 259, 261 (6th Cir. 1991); *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *Winchester Homes, Inc. v. Osmose Wood Preserving, Inc.*, 37 F.3d 1053, 1054 (4th Cir. 1994).

Respondents make no attempt to distinguish those cases.[7] Instead, they seek to shoehorn the Ninth Circuit's remarkable ruling into established practice. That attempt must fail. There can be no dispute here that Lexecon's complaint alleged that Milberg brought its *Lincoln Savings* claim against Lexecon for improper reasons and that *Lincoln Savings* resulted in a termination favorable to Lexecon. The Ninth Circuit conclusively rejected those *factual* contentions at the motion to dismiss stage because it relied on an "order" by a recused judge who gave factual testimony about off-the-record events without being subject to cross-examination. Respondents provide no authority suggesting that the *factual* characterizations contained in that "order" are entitled to such controlling weight at the motion to dismiss stage that contrary allega-

---

[6] Milberg's opposition is studded with inflammatory accusations leveled at Lexecon. Those statements are uniformly untrue and, even more important for present purposes, contradict the allegations in Lexecon's complaint. The whole point of Rule 12(b)(6) is that the plaintiff is entitled to an opportunity to prove such allegations. Lexecon was denied that opportunity here.

[7] The one case from this Court that respondents cite, *Papasan v. Allain*, 478 U.S. 265 (1986), involved historical facts that were "*not* disputed." *Id.* at 268 n.1 (emphasis added). It thus provides no support for their position.

tions contained in a well-pleaded complaint may properly be ignored. *Contrast Friedman*, 927 F.2d at 261 (refusing to take notice of facts in prior opinion at motion to dismiss stage). Accordingly, they have done nothing to diminish either the circuit conflict or the significant issues regarding core procedural protections for plaintiffs raised by the Ninth Circuit's ruling.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL W. MCCONNELL
STEPHEN M. SHAPIRO
MICHELE L. ODORIZZI
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, IL 60603
(312) 701-7201

KENNETH S. GELLER
MAYER, BROWN & PLATT
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK
SEAN A. LEV
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for Petitioners

April 25, 1997

---

[8] Milberg takes issue with our argument that the Court need not address the 12(b)(6) issue if it reverses on the first question. It is well-established, however, that, so long as a decision is interlocutory, it is subject to change by the court that has jurisdiction over the case, *see* Fed. R. Civ. P. 54(b) (orders are "subject to revision at any time before the entry of judgment"), and subject to review on appeal from a final judgment. The same point disposes of the entire brief of the Cotchett respondents. The Arizona court did not "terminate" their case by entering final judgment until after all pretrial proceedings were complete, and after it had lost authority to rule. Accordingly, their case would still be open on remand. In any event, the proper posture of the case on remand is something that can be determined on remand, and need not distract this Court from the purely legal issues presented here.